TENGKU MOHAMED ZAIRUDDEEN TENGKU MD. ZAID

v.

WAZURAIYAH MOHAMAD & ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 145 OF 1984 & NO. 167 OF 1985]
17 AUGUST 1987

LAND LAW: *Caveats lodged on land - Malay Reservation - Land sold to company - Sale subject to approval of ruler-in-council - Removal of caveat - Locus standi of applicant.*

One Wazuraiyah, the respondent in the first appeal and the appellant in the second appeal had made two applications for removal of caveats lodged on the same piece of land. A company which did not have the legal capacity to own the land as it was Malay Reservation had purchased the said land but that sale was subject to the approval of the ruler-in-council to grant them the necessary legal capacity to own the land. She was appointed as trustee by the company but that appointment was effective only if the transfer of land to the company was not approved by the land authorities. As a trustee she was to hold the said land for the company.

Held:
The condition precedent for the appointment of Wazuraiyah as trustee had not been satisfied as the land authorities had not refused the transfer of the land to the company. She did not have a registered interest in the land. Thus, she did not have the *locus standi* under s. 327, National Land Code to apply for the removal of the caveats.

Cases referred to:
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212
Registrar of Titles, Johore v. Temenggong Securities Ltd. [1976] 2 MLJ 44
Foo Say Lee v. Ooi Heng Wai [1969] 1 MLJ 47
Lee Ah Thaw & Anor. v. Lee Chun Tek [1978] 1 MLJ 173

Legislation referred to:
Land Enactment 1938 (Kelantan), s. 9A(1)
Malay Reservations Enactment 1930 (Kelantan), ss. 7, (1), 12, (i), 13A
National Land Code 1965, s. 327

Civil Appeal No. 145/84
For the appellant - Zainur bin Zakaria; M/s. Zainur & Maydien
For the respondent - G. Sri Ram; M/s. Sri Ram, Zulkifly & Kumar

Civil Appeal No. 167/85
For the appellant - G. Sri Ram; M/s. Sri Ram, Zulkifly & Kumar
For the respondents - Wong Swee Min; M/s. Megat Najmuddin Leong & Co.

JUDGMENT

Wan Suleiman SCJ:

In Civil Appeal No. 145/84 the respondent who was the plaintiff in the Court below, Wazuraiyah Bte Mohamad (hereinafter referred to as Wazuraiyah) had applied to remove a private caveat imposed on land held under Geran No. 10588 Lot 763 Mukim of Tanjong Chat, Kelantan by one Tengku Mohamed Zairuddeen bin Tengku Md. Zaid (hereinafter referred to as Zairuddeen).

Tengku Zaid Ahmad who died on 11 May 1983 agreed to sell the caveated land to Zaid Holdings Sdn. Bhd. for RM165,000. On 23 March 1983 Tengku Zaid executed a power of attorney appointing as his attorney one Cik Rosnani binti Abdul Hamid empowering her, among other things, to execute the sale of the land on his behalf. The purchase price was paid to Tengku Zaid in full on 28 March 1983. Wazuraiyah was appointed on 29 March 1983 as trustee by Zaid Holdings Sdn. Bhd. to hold the land earlier mentioned, then owned by Tengku Zaid. It was a condition of the sale that Zaid Holdings was to settle all Tengku Zaid's outstanding personal loans with Kumpulan Kesuma Sdn. Bhd. (Kesuma) and Kumpulan Travel Sdn. Bhd. (Travel). Both Kesuma and Travel by their letters dated 30 March 1983 confirmed that full settlement of all outstanding debts of Tengku Zaid with these two firms had been effected. Acting under her power of attorney Cik Rosnani on 7 May 1983 signed transfer form in the appropriate form, transfering the land to Wazuraiyah. The signatures of both Cik Rosnani and Wazuraiyah on the form were attested by a Collector of Land Revenue. After the sale of the land Tengku Zaid, on 1 April 1983, wrote a letter to the Director-General of Income Tax, submitting a notification of disposal of chargeable assets required under the Real Property Gains Tax Act 1976. Then on 11 May 1983 Tengku Zaid died. Because of the caveat lodged by Zairuddeen the transfer of the land to Wazuraiyah could not be completed.

To support his application for lodgment of the caveat Zairuddeen had disclosed in his statutory declaration dated 11 November 1983 that he was a natural son of Tengku Zaid and that he was in the course of filing for letters of administration of his late father's estate, and that the purpose of the caveat was to protect the interest of the beneficiaries.

In his affidavit in reply to Wazuraiyah's affidavit, Zairuddeen also stated that he was a prospective co-administrator of the estate. He also alleged that his deceased father's letter to Zaid Holdings dated 18 March 1983 concerning the sale and purchase of the land bore a forged signature of the deceased. He also alleged that the deceased's signature on the power of attorney dated 28 March 1983 was false since the deceased had on that day gone to Singapore. It was also alleged by him that the sale was void being contrary to the provisions of the Malay Reservations Enactment Kelantan, 1930.

The learned trial Judge examined the documents attached to Wazuraiyah's affidavit, and regarding the allegation of the respondent noted that the power of attorney was executed by the deceased on 28 March 1983 in the presence of Tan Meng Chin, an advocate and solicitor.

As regards to the sale of land, the transaction entered into, he remarked, was supported by the deceased's letter to the Director-General of Income Tax of 1 April 1983, and as regards the full payment of the purchase price to the deceased, a receipt attached to the affidavit and signed by the deceased he regarded as ample proof. Regarding the settlement of deceased's debt to Kesuma and Travel, two letters dated 30 March 1983 issued by the two companies, he said, were sufficient proof.

He therefore found that the sale was complete and the transfer properly executed. The Judge then held that in the face of the evidence of Wazuraiyah, Zairuddeen's allegation of fraud was not substantiated.

As to the allegation by Zairuddeen that the sale was contrary to the provisions of Kelantan Malay Reservations Enactment, the Judge added that there was nothing to prevent him from bringing an action against Wazuraiyah or any one he chooses under s. 12(i) of that Enactment to declare the sale null and void, but that Zairuddeen would first have to file for letters of administration of his father's estate which he had not done.

Referring to the Privy Council decision in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212, the trial Judge appears to be under the impression that as a general proposition the caveator would have to satisfy the Court that the caveat should remain. For reasons set out by him he was satisfied that the caveator had failed to do so, found in favour of Wazuraiyah and therefore ordered that the caveat entered by Zairuddeen should be removed.

In Civil Appeal No. 167 of 1985 Wazuraiyah the respondent in C.A. No. 145/84, appealed against the decision of Abdul Malek J who had dismissed her application to remove Private Caveat Presentation No. 206 of 1983 (the caveat) which was registered on 29 June 1983 and entered by the four respondents in this appeal over the same piece of land as the one referred to in C.A. No. 145/84.

The basis of her application, briefly is as follows:

(a) On 17 March 1983 Zaid Holdings (hereinafter "ZH") passed a directors' resolution approving the purchase of the said land for RM165,000 and substituting itself for Tengku Zaid bin Tengku Ahmad (hereinafter "Zaid") in the joint venture agreement between Gunung Petaling (hereinafter "GP") and Zaid with regard to the said land;

(b) On 18 March 1983 the registered proprietor of the land, Zaid, agreed to sell the land to ZH for RM165,000 subject to certain terms and conditions mentioned in a letter of the same date;

(c) On 23 March 1983 ZH resolved that Zaid should give a power of attorney to one Rosnani Abdul Hamid in regard to all matters pertaining to the said land;

(d) On 28 March 1983 Zaid issued the acknowledgement and receipt for the payment of RM165,000 for the said land;

(e) On 29 March 1983 ZH appointed the appellant as trustee in respect of the land;

(f) On 7 May 1983 Zaid executed a transfer form under the National Land Code in respect of the said land in favour of Wazuraiyah (appellant);

(g) On 11 May 1983 Zaid passed away;

(h) On 29 June 1983 a caveat was entered by the respondents on the said land;

(i) On 1 December 1983 the appellant's solicitors wrote to the respondents requiring them to remove the caveat.

After considering the affidavits filed by both sides and arguments raised by Counsel, the learned trial Judge dismissed the application. His reasons are briefly as follows:

Following *Eng Mee Yong and Ors. v. V. Letchumanan* [1979] 2 MLJ 212, where the applicant is someone other than the caveatee he has not registered title to rely upon as *prima facie* evidence of his interest in the land and it is for him to begin by satisfying the Court that there are sufficient grounds in fact and in law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat. The learned trial Judge found that the appellant had not raised sufficient grounds to satisfy him on that score.

Having *Eng Mee Yong's* case in mind, his Lordship found that the respondents had succeeded in satisfying the Court that they had in interest in the property which raised a serious question to be tried and that on the balance of convenience it would be better to maintain the *status quo* until the completion of the trial.

He noted that the appellant claimed to be a trustee for ZH but also observed on an examination of the trust deed (WM3) that the trust was to become effective only if the application for transfer from Zaid to ZH is not approved by the Kelantan Land Authorities. There being nothing in the affidavit to show that such an application had ever been made, he held that the trust had not taken effect. He also noted that the purported sale and purchase of the land from Zaid to ZH on 18 March 1983 was also, quite apart from the ambiguous purchase price arising from the second condition that ZH was to settle all of Zaid's outstanding personal loans with Kumpulan Kesuma Sdn. Bhd. and Kumpulan Travel Sdn. Bhd., in contravention of the provisions of ss. 7 and 12 of the Kelantan Malay Reservations Enactment 1930 and s. 104 of the Kelantan Land Enactment 1938. Remarking that the effect of the relevant provisions of these two Enactments is that only a person who is a Malay native of Kelantan can purchase the land, he could find nothing in the affidavit to show that the appellant came within this category and, in any case, ZH could also not bring itself within that category, as its directors frankly admitted in their resolution, Exhibit WM1A. Only the approval of the ruler-in-council he added could save this transaction, but the agreement had not specifically stated that it would be conditional upon such approval.

He therefore held that the agreement was on the face of it null and void, the consideration irrecoverable and no action would lie for breach of the agreement.

He also ruled that the agreement between Zaid and ZH cannot be said to be complete because there was no evidence that the amount to be paid by the two companies mentioned therein had in fact been paid. The learned Judge also found that after the so-called sale and purchase transaction on 18 March 1983 Zaid sent letters to Gunung Petaling (GP) on 20 April 1983, witnessed by his attorney, assigning two million ringgit of his interest to Kumpulan Holdings Sdn. Bhd. If there had in fact been a sale and purchase, he wondered why Zaid had also assigned his interest under the joint venture agreement with GP after the purported sale. He also noted that by virtue of the joint venture agreement with GP, Zaid had in fact deposited the land title with GP's solicitors and had agreed not to deal with the land. The sale and purchase agreement on 18 March 1983 and the assignment of his interest on 20 April 1983 and the circumstances which made that sale and purchase agreement null and void, he held as evidence of the fraudulent intention of Zaid not to honour his part of the joint venture agreement with GP.

Citing the decision in *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 MLJ 44 as authority for the proposition that the purpose of a private caveat is to preserve the *status quo* pending the taking of steps by the caveator to enforce his interest in the land by Court proceedings, he noted that the respondents had already filed an action for specific performance of the joint venture agreement (Kota Bahru Originating Summons No. 278/84), against either ZH or the administrators of Zaid's estate.

Finding therefore that the respondents have a caveatable interest in the joint venture agreement, he dismissed Wazuraiyah's application.

On behalf of appellant in C.A. 145 of 1984, Zainur pointed out that it is common ground that the caveated land is Malay Reservation Land. The respondent, he added, had applied under s. 327 of the National Land Code to remove the caveat.

The learned trial Judge had in his judgment remarked that it is for the appellant caveator to satisfy the Court that the caveat should remain, citing as authority the Privy Council decision in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212. Zainur's contention, (we agree with him), is that the respondent, Wazuraiyah is not the caveatee, not being the registered proprietor of the land. The relevant passage in the latter judgment (at p. 215) reads:

> It is otherwise when the applicant under s. 327 is some one other than the caveatee ... It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

Wazuraiyah's appointment as trustee for Zaid Holdings is conditional on refusal of the Kelantan Land Authority to approve the transfer from Tengku Zaid to Zaid Holdings Sdn. Bhd.

Would that make Wazuraiyah an aggrieved person?

Encik Sri Ram's (for respondent) reply is that ZH never signed the agreement but merely undertook to enter into an agreement by paying a deposit the day after the resolution by ZH was passed on 17 March 1983 and (further consequential resolutions followed on 23 March 1983 and 29 March 1983 - pp. 14 & 15 respectively). Therefore it was a conditional agreement, and therefore cannot, despite Zainur's contention, be void. The latter had advanced the argument that s. 7(1) of the Kelantan Land Enactment had the effect of making that agreement void *ab initio*.Section 7(1) reads:

> No right or interest of any Malay in reservation of land and no right or interest in such land acquired by virtue of s. 13A by any person not being a Malay shall be ... not being a Malay ... save as provided in the Enactment.

It is the sort of agreement says Mr. Sri Ram which comes within the ambit of the Federal Court decision, in *Foo Say Lee v. Ooi Heng Wai* [1969] 1 MLJ 47.

There, the plaintiff had entered into an agreement with the defendant for the purchase of land in Kota Bahru which was Malay Reserve Land. A condition of the agreement provided that the sale was subject to the approval of the Kelantan government and His Highness the ruler-in-council (under s. 13A of the Enactment). It was held that such an agreement was not null and void.

Turning now to the matter under appeal, we note that on 17 March 1983 (see p. 11 of record) ZH passed a resolution to purchase the land from Zaid, that respondent Wazuraiyah be appointed as trustee to hold the property in trust for ZH as ZH cannot hold landed property in Kelantan. It was finally resolved that ZH should apply to the relevant authorities to be gazetted as a Kelantan Bumiputra Company, no doubt thereafter to be added to Schedule D of the Kelantan Land Enactment under s. 9A(1) thereof.

Five days later (on 23 March 1983) ZH passed another resolution whereby Zaid gave a power of attorney to Cik Rosnani Abdul Hamid to execute all relevant and transfer documents, and on 29 March 1983 yet another resolution was passed authorising her to execute a transfer to ZH, with the further resolution that if there is no approval by the Kelantan Land Authorities so to do, to transfer the land instead to Wazuraiyah who was to hold the land as trustee for ZH.

At pp. 16 to 18 of the records is a copy of the transfer to Wazuraiyah dated 7 May 1983, ostensibly in her personal capacity.

This transfer was not registrable, he added, because of the caveat.

It is not in dispute that Wazuraiyah is a Kelantan Malay. In those cases cited for the appellants, Sri Ram argues, one of the parties was not a Kelantan Malay.

However there is, as Zainur says no running away from the fact that Wazuraiyah came into the picture solely because of the various resolutions passed by ZH which we have alluded to earlier. Zainur argues that the facts in the instant appeal are not covered by the principle

in *Foo Say Lee*. There the agreement was conditional upon the Ruler-in-Council's approval under s. 13A of the Enactment. In the instant appeal, the trustee Wazuraiyah was appointed to receive the transfer pending the approval of ZH's application to be gazetted as a Kelantan Bumiputra company under s. 13A. Whilst the later resolutions on 23 March 1983 and 29March 1983 contemplated appointment of Wazuraiyah as trustee only in the event of failure to obtain such approval, the transfer at pp. 16/18 of the records on 7 May 1983 was a transfer to her, ostensibly in her personal capacity. Whilst what preceded this later step would be evidence that she received the transfer as trustee of ZH, would such fact not be in contravention of s. 12 of the Enactment and therefore make the dealing and disposal null and void?

It may well be that if the issue is whether the appellant himself has a caveatable interest, he might not as beneficiary of a residuary title have claim to such, following *Lee Ah Thaw & Anor. v. Lee Chun Tek* [1978] 1 MLJ 173, but that is not the question we seek to answer. The question which arises is whether as we have said earlier, the respondent Wazuraiyah has satisfied us "that there are sufficient grounds in fact and in law for treating her as a person claiming such an interest in the land as would make her aggrieved by the existence of the caveat", to paraphrase Lord Diplock's remarks in *Eng Mee Yong's* case.

We can only assume that ZH had either abandoned the attempt to be included as a company in Schedule D of the Enactment on an application being duly made under s. 13A thereof, or had failed to obtain such approval. In either event, no evidence having been made available one way or other, the fact of Wazuraiyah, as trustee for ZH being made registered owner of the land would clearly be in contravention of s. 12 of the Enactment and therefore null and void. In the result Wazuraiyah has failed to show that she is a person aggrieved under s. 327 NLC and the caveat should remain.

Accordingly we would allow the appeal in C.A. No. 145 of 1984 with costs here and below. Deposit to be refunded to appellant.

Coming now to C.A. No. 167 of 1985 where the learned trial Judge held that the applicant Wazuraiyah had no *locus standi* under s. 327 of the National Land Code. Mr. Sri Ram adopted the arguments previously advanced by him on *locus standi* in C.A. No. 145 of 1984. In addition he had one further argument. We were referred to p. 14 of the records in C.A. No. 167 of 1985. This is the directors' resolution dated 17 March 1983 wherein, to summarise: (1) ZH resolved that the company should purchase the land, (2) ZH is to be substituted in place of Zaid in the joint-venture agreement between Zaid and GP regarding the said property, (3) a trustee be appointed to hold the property in trust for ZH which cannot hold landed property in Kelantan and (4) ZH is to apply to the relevant State authority in Kelantan to be gazetted as a Kelantan Bumiputra Company.

The joint-venture agreement dated 5 January 1982 was made conditional upon approval of the ruler-in-council of the sale from Zaid to any person or body not being a Malay but who is a native of Kelantan with a clause for GP to determine the agreement if such approval is not obtained within 15 months from 5 January 1982, the date of it being signed. Presumably the ruler-in-council's approval was not sought to obtain such approval under s. 13A of the Enactment.

Mr. Sri Ram adds that since the condition precedent i.e. such approval was not obtained within 15 months, the agreement was no longer valid. The assignment on 9 May 1983 to the respondent was after the lapse of the agreement. However, there was no evidence of the termination by GP of the agreement in accordance with the provisions mentioned earlier. Mr. Sri Ram argues that a conditional agreement cannot be enforced until the condition precedent

has occured. On p. 22 of the Supplementary Records in C.A. No. 167 of 1985 the learned trial Judge referred to a suit filed by GP against ZH or the personal representatives of Zaid for specific performance of the joint-venture agreement. He also referred to pp. 76 and 77 of the records where ZH had acted on the assumption that the agreement was still valid and so wrote the letters there at to GP, and Mr. Sri Ram having taken over from the previous solicitors also acted on same assumption in writing the letters at pp. 62/63 dated 1 September 1983.

We are inclined however to agree with Mr. Wong (for the respondent) that the only issue still is whether Wazuraiyah is a person aggrieved. One should remember that this is an application under s. 327 of the National Land Code, and just as we have held in C.A. No. 145 of 1984, the principle enunciated in *Eng Mee Yong & Ors. v. V. Letchumanan* applies, namely, not being a caveatee since she is not the registered proprietor of the land it is for her to satisfy us that there are sufficient grounds in fact and law for treating her as a person claiming such an interest in the land as would if if were established, make her aggrieved by the existence of the caveat. Though Mr. Wong is incorrect in thinking that the argument as to whether the respondent as a caveator must first satisfy the Court that on the evidence his claim to an interest in the property does raise a serious question to be tried, etc. was never raised in the Court below, it seems to us that the question was indeed raised - (see p. 23 of the Supplementary record) - for the learned trial Judge considered this matter and held that the respondent had in fact succeeded in so proving. The need for respondent so to prove is not necessary in the present case. That point was considered because the trial Judge had misapprehended the purport of Lord Diplock's judgment in the passage preceding the one we have cited from *Eng Mee Yong's* case.

We agree with Mr. Wong however that the condition precedent for the appointment of Wazuraiyah as trustee had not come to pass, i.e. that there was no refusal by the Kelantan Land Authority to allow the transfer to ZH. In any case even if she had been properly appointed, the trust is indeed for an illegal purpose. There had been no sale and purchase agreement in the real sense, only a series of company resolutions, those we have referred to earlier. Her appointment would in any event indeed be an attempt at a dealing contrary to s. 12 of the Enactment and therefore null and void.

What interest indeed could Wazuraiyah acquire which would make her aggrieved by the existence of the caveat under the void agreement? We would hold that she would acquire none and would therefore dismiss the appeal with costs here and below. Deposit to respondent on account of taxed costs.

Also found at [1988] 2 CLJ 18